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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JUDY MADSEN, *et al.*,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

AMICUS BRIEF OF DEFENDANTS OPERATION RESCUE, PATRICK MAHONEY, RANDALL TERRY, AND BRUCE CADLE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici are parties to the underlying litigation in this case.

SUMMARY OF ARGUMENT

The Supreme Court of Florida reviewed the anti-speech portions of the challenged injunction under the "time, place, and manner" test. This was clear error. The anti-speech portions of the injunction before this

Court trigger—and violate—the doctrine of prior restraints.

This Court has never reviewed speech-restrictive injunctions under the "time, place, and manner" test for legislative enactments. On the contrary, this Court has repeatedly subjected anti-speech injunctions to the heightened standards governing prior restraints. *E.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968).

As this Court has frequently observed, the elimination of prior restraints was a leading purpose of the First Amendment. *E.g., Carroll*, 393 U.S. at 181 n.5. Prior restraints represent the most serious and least tolerable infringement on free speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Injunctions do not just "chill" speech—they "freeze" communication before it takes place. Anti-speech injunctions, unlike generally applicable legislative enactments, inherently partake of censorship because they apply selectively to those bearing a particular message. Speakers who proceed despite injunctions face streamlined contempt proceedings and typically lose the opportunity to raise constitutional defenses because of the collateral bar rule. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967). Injunctions impose blanket advance prohibitions on certain expressive activities (e.g., "picketing" in certain places) rather than applying hindsight to distinguish otherwise lawful activities from criminal or tortious abuses. Injunctions against otherwise lawful expressive activities make judges one-man legislatures, eliminating the possibility of disinterested trial court review of the speech restrictions. Injunctions circumvent the checks, balances, and delays of the legislative and criminal process and instead impose instant restrictions on speech "by the stroke of a pen."

The "time, place, and manner" test which the Supreme Court of Florida used to review the present injunction is also inappropriate by its very terms. ***Regulations*** on speech in public fora are the exclusive province of representative government bodies, not the prerogative of civil plaintiffs. Furthermore, private plaintiffs have no standing to assert the *governmental* interests necessary to sustain time, place, and manner regulations.

Reaffirmation of the distinction between injunctive prior restraints and legislative time, place, and manner regulations is essential in light of the recent departure from this rule by a number of lower courts, including the court below. These courts have disregarded the distinction between ordinances and injunctions and have badly confused the elements of prior restraints with this Court's jurisprudence regarding content-neutrality.

Under the proper test—the doctrine of prior restraints—the anti-speech injunctive restrictions at issue here are unconstitutional. Anti-abortion speech does not fit into any exception to the prior restraint doctrine, such as obscenity or "fighting words." Nor does any grave countervailing interest override the right to engage in peaceful free speech outside abortion businesses. Finally, the sweeping injunctive restrictions fail to draw the necessary distinctions between genuinely unlawful conduct and legitimate public expressive activity.

This Court must reverse the judgment of the Supreme Court of Florida.

ARGUMENT

"The elimination of prior restraints was a leading purpose in the adoption of the First Amendment." *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 n.5 (1968) (internal quotation marks and citation omitted). *Accord Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). The decision of the court below in the present case strikes at the heart of this constitutional guarantee.

The Supreme Court of Florida treated the amended permanent injunction at issue as if it were a municipal ordinance subject to the "time, place, and manner" test for regulations on speech. This represents a fundamental jurisprudential error. Anti-speech injunctions trigger the doctrine of prior restraints, not the more deferential test for time, place, and manner regulations.[1] Under the doctrine of prior restraints, the speech-restrictive portions of the injunction at issue are plainly unconstitutional.

I. INJUNCTIVE RESTRICTIONS ON EXPRESSIVE ACTIVITIES TRIGGER THE DOCTRINE OF PRIOR RESTRAINTS.

A provision in an injunction which restricts a person's freedom of speech triggers the strictest standard of constitutional review: the doctrine of prior restraints.

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[1] The "time, place, and manner" test provides that in public fora, government may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Amici believe the challenged injunctive provisions fail the time, place, and manner test. Nevertheless, reaffirmation of the prior restraint doctrine is crucial as a jurisprudential matter, as explained herein, in light of the recent doctrinal confusion among lower courts. *Infra* § I(C).

A. This Court Has Consistently Treated Anti-Speech Injunctions as Prior Restraints.

"Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (citation omitted). "The term prior restraint is used to decribe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Id.* (internal quotation marks, emphasis, and citation omitted). The speaker who proceeds in the face of a prior restraint faces punishment simply for violating the dictates of the restraint, regardless of whether the expressive activity would have been otherwise lawful. Subsequent punishment schemes, by contrast, only impose sanctions for specific tortious or criminal conduct. The "time-honored distinction between barring speech in the future and penalizing past speech . . . is critical to our First Amendment jurisprudence." *Id.* at 2773. "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

Thus, while statutes, ordinances, and regulations[2] restricting speech trigger the traditional "time, place and manner" analysis, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ordinance); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (regulations),

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[2] The reference here is to laws setting forth substantive norms for conduct. Advance permit or licensing schemes, by contrast, even when enacted as ordinances or regulations, constitute classic prior restraints. *E.g.*, *Freedman v. Maryland*, 380 U.S. 57 (1965) (license for exhibition of motion pictures); *Lovell v. Griffin*, 303 U.S. 444 (1938) (permit for literature distribution).

injunctions trigger the much stricter doctrine of prior restraints, *e.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (injunction against marches, distribution of pamphlets, and display of materials); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968) (court order restraining public rallies and meetings); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (injunction against publication of classified government documents).

"The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

B. Injunctive Restrictions in Private Litigation Cannot Qualify as Government Regulations of Time, Place and Manner.

As noted in the preceding section, injunctions against expressive activity trigger the strict doctrine of prior restraints, not the more deferential standard of time, place, and manner regulations. This Court has recently reaffirmed this "time-honored distinction," calling it "critical" to First Amendment jurisprudence. *Alexander*, 113 S. Ct. at 2773. There are very strong reasons for maintaining this categorical distinction.

1. *Injunctions pose greater risks to free speech than do uniform governmental regulations.*

Injunctions against expressive activity pose heightened threats to free speech, making the strict doctrine of prior restraints especially important.

a. *Irreparable loss of opportunity to communicate*

Time is often of the essence in matters of free speech. This is especially true when the opportunity to reach the intended audience is fleeting or when the value of the message is time-sensitive.[3] Injunctive restraints devastate the timeliness of speech:

> Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech . . . Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

A. Bickel, *The Morality of Consent* 61 (1975). "A prior restraint, . . . by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n*, 427 U.S. at 559 (footnote omitted).

b. *Discrimination*

A statute or ordinance applies uniformly, while an injunction imposes special legal restrictions only upon a particular group of people. If the enjoined acts are otherwise lawful—like engaging in expressive activities on a public sidewalk—then the injunction essentially defines a new offense which applies only to certain people. This

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[3] In the case at bar, for example, pro-life picketers and sidewalk counselors address their message, *inter alia*, to passersby and those entering the Aware abortion business. While the availability of a generic "audience" persists over time, this audience is certainly not fungible. Rather, each passerby, each woman entering Aware for an abortion, each companion of a person seeking pregnancy counseling, represents an individual who may never pass that way again and for whom the information offered may represent a "now-or-never" alternative.

injunctive creation of substantive offenses inherently results in unequal legal treatment.

In the present case, for example, those who *support* abortion, or those who protest anything *but* abortion, are free to assemble on the sidewalk outside the Aware abortion business—yet pro-life citizens may not. Am'd Perm. Injunc. ¶ 3 (Pet. App. B-7). Those seeking signatures on a petition regarding the conflict in Bosnia may freely approach women going into Aware within 300 feet of the building, but those offering information on alternatives to abortion must wait for the women to initiate communication. *Id.* ¶ 5 (Pet. App. B-8). Holocaust survivors who suspect a Melbourne, Florida resident of being an escaped Nazi war criminal may carry protest signs within 30 feet of his home, but pro-life individuals may not do the same within 300 feet of an abortionist's residence. *Id.* ¶ 6 (Pet. App. B-9). *Cf. Judge Allows Residential Pickets: Demonstrators to Return to Demjanjuk Home*, The Plain Dealer (Cleveland), Dec. 16, 1993, at 1B (court overturned ordinance and allowed Jewish activists to picket Demjanjuk). Such blatant discrimination among expressive activities in public places constitutes "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980) (citation and quotation marks omitted). *See also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993) (First Amendment forbids viewpoint discrimination).

c. *Denial of defenses*

Those alleged to have violated an ordinance retain the full range of due process rights and substantive defenses. Moreover,

> [a] criminal penalty or a judgment in [an action for damages] is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction.

Nebraska Press Ass'n, 427 U.S. at 559. Those alleged to have violated an injunction typically face summary contempt proceedings with virtually no opportunity to raise any defense other than denial of the alleged acts.

In particular, the "collateral bar rule" prevents alleged contemnors from defending themselves by challenging the constitutionality of the underlying injunctive restrictions. *E.g. Walker v. City of Birmingham*, 388 U.S. 307 (1967). As one commentator observed, anti-speech injunctions yield the situation of a "prosecuted speaker who has a good first amendment claim on the merits but can only tell it to the wind." Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 83 (1981).

d. *Advance, categorical prohibition*

Injunctions dramatically contract expressive liberty by imposing advance *fiats* which bind regardless of whether the actual conduct ultimately proves not to violate any norm of tort or criminal law.

Much of the expressive liberty the people of this nation enjoy consists of that "breathing space" which exists *between* the twin poles of criminal behavior and pristine free speech. This "breathing space" is essential for First Amendment freedoms. *NAACP v. Button*, 371 U.S. 415, 433 (1963). Of perhaps greater practical importance, this "breathing space" is the safe haven for countless daily activities. The manifold expressive human acts which do not violate the elements of any crime or tort remain liberties even without case law placing these activities squarely within the First Amendment.

Subsequent punishment schemes preserve this expanse of liberty: the speaker avoids punishment unless the actual conduct undertaken proved unlawful. Injunctive restraints, by contrast, eliminate this "middle ground" of freedom: expressive conduct which the injunction categorically defines in advance as unlawful (e.g., "picketing" at a certain place) becomes an *ipso facto* basis for sanctions, even if the actual activity was otherwise completely lawful and unobjectionable.

Suppose, for example, that boycott advocates are accosting customers. Some press their case in a rude, intrusive manner; others, while insistent, are completely civil and courteous. An injunction against "approaching another without any indication of a desire to communicate" would destroy the liberty of the boorish and the genteel alike; a disorderly conduct or disturbing the peace statute, by contrast, would weed out, with the 20-20 vision of hindsight, only the true offenders.

e. *Denial of impartial judicial review*

The task of a court is to *review* a law, not to *draft* one. When a judge issues a substantive injunction, he effectively removes one level of judicial review. Just as a former legislator appointed to the bench ought not to hear a case challenging a law he himself authored, so a judge ought not to be in the position of judging an injunction he himself crafted.

Furthermore, "[m]any judges who have issued injunctions may feel a personal stake in the enforcement of their order," Blasi, *supra*, at 61, and "may be overly sensitive to perceived affronts to their authority," *id.* at 23. The daunting prospect of facing in a contempt proceeding the very judge who issued the order doubtless exerts a powerful chilling effect on expressive activity. Prosecutors exercise considerable discretion in deciding whether to charge the occasional misstep or bravado of the political demonstrator. But the judge who has personally enjoined

the demonstrators may feel a strong—and understandable—need to vindicate his own credibility and authority in the face of careless or defiant protesters. Meanwhile, the civil plaintiff's microscopic surveillance of the demonstrators, coupled with that plaintiff's vigorous goading of contempt enforcement, aggravates both the potential judicial bias and the legitimate fear of the would-be speaker. These distorting factors are largely absent in a regime of subsequent punishment, where the "affront" is to the legislature or executive, not to the judge.

f. *Avoidance of legislative and prosecutorial checks on speech restrictions*

Injunctions also circumvent the built-in institutional checks of legislative and prosecutorial action, checks which can safeguard freedom of expression against excessive ease or haste in suppressing speech. The doctrine of prior restraints therefore provides a vital curative. As one commentator explained:

> Injunctions are issued . . . "by a stroke of a pen." . . .
>
> [T]raditional principles of equity . . . are not likely to deter or seriously delay regulatory agents who desire to invoke legal authority to suppress speech. *Were it not for the additional adverse presumption imposed by the doctrine of prior restraint, the swiftness and relatively streamlined nature of the procedures by which injunctions are issued could be expected to attract regulatory agents in droves.* Overuse of the power to regulate speech is likely under such conditions, particularly in light of the political gains some regulatory agents may achieve when the public's cry for suppression can be satisfied while emotions are still running high.
>
> . . . .
>
> Under the subsequent punishment regimes, in contrast, the process by which regulatory impulses are

implemented is far more complicated, drawn out, and interlaced with disincentives.

Blasi, *supra*, at 58-59 (emphasis added). In short, "suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process [and, moreover, injunction suits] do not require attention to the safeguards of the criminal process . . . ." T. Emerson, *The System of Freedom of Expression* 506 (1970).

Judicial creation of new substantive laws, by means of an injunction, bypasses and denigrates the legislative function of elected, representative bodies. City councils and state legislatures have the task of making policy judgments regarding what laws to enact defining offenses and regulating conduct. If a city council enacts an ordinance creating "speech-free zones" around certain facilities or otherwise restricting public expressive activities, those aggrieved are free to challenge that law in a civil rights action. If, on the other hand, city officials *decline* to enact a restriction on certain expressive activities, a court should not substitute its judgment for that of elected officials by imposing the same restriction in injunctive form. Courts are not back-up legislatures. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 742 (1971) (Marshall, J., concurring) (Constitution does not provide for "government by injunction" in which courts may "make law"); *id.* at 731 (White, J., concurring) (prior restraint not justified, "at least in the absence of express and appropriately limited [legislative] authorization"). Furthermore, such misuse of the judiciary overburdens the courts and encourages elected officials to evade responsibility by referring citizen complaints to judges.

Courts refuse to rewrite unconstitutional laws; nor should a court write the law in the first place in the form of a substantive injunction. *Cf. Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("It is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully

enacted to deal with situations like the one confronted here by police and protestors"); *cf. also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) ("We do not believe . . . that . . . the time, place, or manner decisions assign to the judiciary the authority to replace [government officials] as the manager of [public forum property]").

The doctrine of prior restraints establishes a constitutional barrier to the abuse of the judiciary and a constitutional safeguard for free speech rights. By evaluating the injunction at issue under the time, place, and manner standard applicable to legislation, the Supreme Court of Florida nullified these constitutional safeguards.

2. *"Time, place and manner regulation" of public forum property is the exclusive prerogative of government.*

Private litigants lack the authority to "regulate" public forum property. A governmental body, like a private property owner, retains the authority (subject to constitutional limitations) to decide for itself how best to control the use of property under its control. *Adderley v. Florida*, 385 U.S. 39, 47 (1966). But a *private* entity by definition neither owns nor controls *public* forum property; hence, private entities have no authority to assume regulatory control over public rights of way or other government property—indeed, to do so would be to usurp this prerogative of ownership.

This is not to say that private persons have no right to *redress* for injuries to their private interests. The point rather is that *regulatory* authority—that authority which the time, place, and manner test governs—is the exclusive prerogative of representative government. For example, a private litigant may have government agents enforce existing government regulations against loitering or parading without a permit. But in the absence of such regulations, a private entity may not simply sue to

impose loitering or parade permit restrictions on the use of streets and sidewalks. Likewise, an abortion business—a private entity—can assert no power to "regulate" adjacent public sidewalks.

3. *Private parties lack standing to assert government interests.*

A related point is that private litigants lack *standing* to assert *government interests*. The "time, place, and manner" test inquires whether a given restriction is narrowly tailored to further some "significant *government* interest." *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added; citation omitted). There are many potentially assertable government interests. Such interests are frequently in tension with each other (e.g., maximizing safety vs. maximizing personal liberty). The essence of legislative prerogative is the selection among, and balancing of, these diverse interests.

Elected representatives must decide whether to restrict pornography dealers, for example, in the interest of family welfare, or leave such enterprises to the forces of the marketplace, in the interest of promoting commercial liberty. Similarly, government officials must decide whether or not to require parental consent for abortions by minor women, whether or not to ban targeted residential picketing, whether or not to forbid solicitation in airport terminals, and so forth. All of these *potential* regulations require *governmental* selection among competing *governmental* interests. Private entities cannot dictate the outcomes in these discretionary matters by invoking "government interests" for their own private benefit. On the contrary, private litigants have standing only to assert their own *private* interests. A plaintiff cannot claim that because the *government* could restrict plaintiff's adversaries with a certain law, *plaintiff* may sue to have a court impose a similar restriction. As this Court explained in a

different context in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974),

> [t]o permit a complainant who has no concrete [i.e., personal] injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Id. at 222. Thus, by its very terms, the time, place, and manner test for implementing *government* interests is entirely inapposite to *private party* litigation.[4]

C. Reaffirmance of the Traditional Doctrine of Prior Restraints Is Necessary in Light of the Recent Disregard by Lower Courts of This Court's Teachings.

The need to reaffirm the applicability of the prior restraint doctrine to anti-speech injunctions is particularly important today. Over the last eight years, lower courts have tended with increasing frequency to disregard or reject this Court's teachings on this question.

The Florida Supreme Court in this case committed two basic errors regarding the constitutional review of anti-speech injunctions:

(1) replacing the prior restraint doctrine with the "time, place, and manner" test; and,

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[4] It is no answer to point out the obvious fact that the court is a government actor. The role of the court in private litigation is to mediate disputes between private interests, not to intervene as plenipotentiary government regulator. Thus, while judicial action remains "state action" under the Fourteenth Amendment, the court's jurisdiction extends only to the conflicting private interests presented to the court. To hold otherwise would be to mock the concept of judicial restraint.

(2) limiting the prior restraint doctrine to content-based injunctions.

These errors typify the very recent confusion of many lower courts over the prior restraint doctrine.

1. *Lower courts have confused the standards governing injunctions and ordinances.*

The basic, categorical error of the court below consisted in applying the wrong standard—the time, place, and manner test—to the injunction at issue. This categorical error permeates recent lower court decisions reviewing anti-speech injunctions.

This Court has *never* examined an anti-speech injunction under the "time, place, and manner" standard. This is no mere coincidence. *Supra* § I(A), (B). Faced with a complete lack of pertinent authority, lower courts have nevertheless sought to justify their departure from this rule either by *ipse dixit* (i.e., no citation of authority)[5] or by citation of non-injunction cases (i.e., misappropriation of inapposite cases).

Apparently the first decision clearly to depart from this Court's teaching on the difference between injunctive prior

[5] A flagrant example of this appears in *Murray v. Lawson*, 264 N.J. Super. 17, 624 A.2d 3 (App. Div.), *certif. granted*, 133 N.J. 445, 627 A.2d 1149 (1993). The Appellate Division of the Superior Court of New Jersey made the following astonishing declaration, without citing any authority whatsoever: "neither the United States Supreme Court, nor our [New Jersey] Supreme Court, have ever suggested that regulation of protected speech by injunction, rather than by legislation, must be judged under a different, stricter standard." 264 N.J. Super. at 35, 624 A.2d at 13.

To the same effect is the following unsupported assertion in *Ramsey v. Edgepark, Inc.*, 66 Ohio App. 3d 99, 109, 583 N.E.2d 443, 450, *review dismissed*, 53 Ohio St. 3d 712, 560 N.E.2d 780 (1990): "While the case before us does not arise in the context of a legislative ban on targeted picketing, but arises in the context of whether a court may protect a residence from targeted picketing in the interest of protecting the right to privacy, the underlying rationale remains the same."

restraints and legislative time, place, and manner regulations was *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). In upholding (over vigorous dissents) sweeping, draconian restrictions on pro-life picketing and leafletting, the *Bering* court applied the "time, place, and manner" test, 106 Wash. 2d at 222, 721 P.2d at 925, citing this Court's decisions in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. Grace*, 461 U.S. 171 (1983); and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *Clark*, *Grace*, and *Perry* admittedly recite the elements of the "time, place, and manner" test; however, none of these cases involved injunctions.

The *Bering* court's failure to grasp this Court's articulation of the prior restraint doctrine appeared even more plainly later in its opinion, when the court purported to confront the doctrine directly. 106 Wash. 2d at 235-36, 721 P.2d at 932. In its discussion, the Washington supreme court listed a string of decisions by this Court reviewing statutes, ordinances, and regulations, and then stated: "Several of these cases are classic prior restraint cases, yet the doctrine is unmentioned." *Id.* at 236, 721 P.2d at 932. The Supreme Court of Washington apparently thought that *this* Court had forgotten what a prior restraint is. In fact the reverse was true.

In the years after *Bering*, other lower courts have followed *Bering*'s lead, invoking *non-injunction* cases[6] for the "time, place, and manner test," and then applying that test to *injunctive* restrictions on expressive activities.[7]

[6] In addition to *Clark*, *Grace*, and *Perry*, these errant decisions cite *Heffron v. ISKCON*, 452 U.S. 640 (1981); *Adderley v. Florida*, 385 U.S. 39 (1966); and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). *See infra* note 7.

[7] *See, e.g., Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (1989) (citing *Perry*, *Heffron*); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project*

Curiously, these cases seemingly always arise in the context of anti-abortion demonstrations, raising the question whether a result-oriented mentality might not be at work.[8]

Jericho, 52 Ohio St. 3d 56, 556 N.E.2d 157 (citing *Grace*, *Perry*, *Heffron*, *Grayned*, *Adderley*), *reh'g denied*, 53 Ohio St. 3d 706, 558 N.E.2d 61 (1990); *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992) (citing *Perry*), *appeal after remand*, 502 N.W.2d 536 (N.D. 1993); *Murray v. Lawson*, 264 N.J. Super. 17, 624 A.2d 3 (App. Div.) (citing *Perry*), *certif. granted*, 133 N.J. 445, 627 A.2d 1149 (1993); *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530 (citing *Grace*), *cert. denied*, 111 S. Ct. 2836, 112 S. Ct. 75 (1991); *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 18 Cal. App. 4th 359, 16 Cal. Rptr. 2d 540 (citing *Perry*), *review granted*, 851 P.2d 774, 19 Cal. Rptr. 2d 492 (Cal. 1993); *Horizon Health Center v. Felicissimo*, 263 N.J. Super. 200, 622 A.2d 891 (App. Div.) (citing *Perry*), *certif. granted*, 634 A.2d 527 (N.J. 1993).

Three federal circuits have fallen into this same error. *See Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) (citing *Grayned*, *Grace*); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989) (citing *Clark*, *Heffron*, *Grayned*), *cert. denied*, 495 U.S. 947 (1990); *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991) (relying on *Portland Feminist* and *New York State NOW* and citing *Clark* and *Frisby v. Schultz*, 487 U.S. 474 (1988)).

To their credit, other federal circuits have declined to condone the injunctive formulation of "time, place, and manner" regulations on expressive activity. *See Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989); *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). (For that matter, the Second Circuit's decision in *New York State NOW* recognized the need to limit the injunction to unlawful conduct, as opposed to expressive activities on public sidewalks. 886 F.2d at 1363. Hence, the court's invocation of the "time, place, and manner" test was unnecessary.)

[8] The Bureau of National Affairs seems to think so. In its publication, "The United States Law Week," BNA routinely lists under the subject heading "Health Care" any case arising out of anti-abortion protests, regardless of what the actual legal issues are. *E.g.*, 61 U.S.L.W. 4069 (Jan. 12, 1993) (listing *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), under "Health Care - Abortion" while central issue was Civil Rights Act of 1871); 62 U.S.L.W. 4073 (Jan. 25, 1994) (listing *National Organization for Women v. Scheidler*, 114 S. Ct. 798 (1994), under "Health Care - Abortion" while central issue was RICO); 62 U.S.L.W. 3485 (Jan. 25, 1994) (listing the present case under "Health Care"). The implicit rationale is that "abortion cases," broadly defined, are a law unto themselves.

The Florida Supreme Court, following the same routine, simply cited *Perry* as its authority for using the "time, place, and manner" test, Pet. App. A-14, despite the fact that *Perry* was not an injunction case.

2. *Lower courts have confused prior restraints with content-based restrictions.*

The court below also committed a basic definitional error by confining the doctrine of prior restraint to "content-based restrictions," Pet. App. A-19. This definitional error reflects recent lower court decisions muddling the category of prior restraints with the separate category of content-based restrictions.

This conflation of the *type* of restriction (prior restraint vs. subsequent punishment) with the *content-neutrality* (or lack thereof) of the restriction also apparently originates with the flawed decision in *Bering v. SHARE*. The *Bering* court took the truly bizarre position that a speech-restrictive injunction is *not* a prior restraint if it *is content-based*:

> the injunction ultimately obtained did not suppress speech 'of any kind,' but rather particular words . . . . In short, this is not the classic prior restraint described in *Near* [*v. Minnesota ex rel. Olson*] or [*Organization for a Better Austin v.*] *Keefe*, and the doctrine of prior restraint should not be applied to this case.

106 Wash. 2d at 235, 721 P.2d at 932. Not surprisingly, no other court has embraced this absurd holding.

The Third Circuit, however, committed exactly the opposite error. In *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991), the court flatly declared: "A prior restraint is a *content-based* restriction on speech prior to its occurrence," *id.* at 63 (emphasis added). The court cited no authority for this proposition, and for good reason: the proposition is demonstrably false. An injunction need not restrict the content of the enjoined expression in order to qualify as a prior restraint. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court struck down an injunction that forbade "passing out pamphlets, leaflets or literature *of any kind*, and from picketing," *id.* at 417 (emphasis added; quoting injunction), calling the order a "prior restraint," *id.* at 419. In *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968), this Court struck down an injunction that forbade " 'holding rallies or meetings . . . which will tend to disturb and endanger the citizens of the County and . . . from using . . . any . . . sound making or producing device thereby disturbing the tranquility of the populace of the County,' " *id.* at 177 n.3 (quoting order); again, this Court analyzed the injunction as a prior restraint, *id.* at 181. For that matter, the licensing schemes this Court has condemned as prior restraints are typically blanket, facially content-neutral restrictions. *E.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (permit for public demonstration); *Lovell v. Griffin*, 303 U.S. 444 (1938) (permit for literature distribution).

The court below simply cited and mouthed the erroneous statement of the Third Circuit in *Northeast Women's*.[9] The Third Circuit's erroneous *ipse dixit* has taken on a doctrinal life of its own.

[9] The court below also cited *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990). *Planned Parenthood League*, however, does not endorse this particular error. Instead, *Planned Parenthood League* commits the more basic error, discussed *supra* § I(C)(1), of incorrectly asserting that a prior restraint need only satisfy the "time, place, and manner" test—one of the elements of which is content neutrality—in order to be constitutional. 406 Mass. at 716, 550 N.E.2d at 1370. To conclude from this that a content-neutral injunction is not a prior restraint is no more sensible than concluding that an injunction which furthers an important government interest is not a prior restraint.

This Court should repudiate—before it spreads any farther—the false notion that only content-based restrictions can qualify as prior restraints.

II. THE ANTI-SPEECH INJUNCTIVE RESTRICTIONS AT ISSUE ARE UNCONSTITUTIONAL PRIOR RESTRAINTS.

This Court has consistently "interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments," *Alexander*, 113 S. Ct. at 2773 (citation omitted). "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Keefe*, 402 U.S. at 419 (and cases cited). "Respondent[s] thus carr[y] a heavy burden of showing justification for the imposition of such a restraint." *Id.* "In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions*, 420 U.S. at 559.

Respondents have failed to carry this heavy burden in the present case.

A. Anti-abortion Speech Does Not Fall Within the Narrowly Defined Exceptions to the Prior Restraint Doctrine.

The speech of pro-life picketers and sidewalk counselors can entail a broad variety of expressions—everything

from silent witness, to polite offers of information, to urgent entreaties, to pointed criticisms, to emotional exclamations. Such speech, however characterized, cannot be relegated wholesale to the forbidden categories of obscenity or "fighting words." On the contrary, pro-life speech "is entitled to the fullest possible measure of constitutional protection," *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (listing, as example, "Abortion is Murder"). Hence, no exception to the prior restraint doctrine can justify the injunctive restrictions at issue.

B. No Countervailing Interest Can Justify the Drastic Measure of a Prior Restraint in This Case.

Moreover, this case presents no extraordinary, overriding need to suppress speech.

In *Keefe*, this Court held that a private citizen's allegations of coercion, intimidation, and invasion of residential privacy were insufficient to justify a prior restraint. In *Nebraska Press Association*, this Court found a private citizen's competing constitutional right to a fair trial under the Sixth Amendment insufficient to justify a prior restraint. In *New York Times v. United States*, this Court held that even national security interests fell short of justifying a prior restraint. *A fortiori*, the prior restraint in this case—which seeks only to prevent alleged "harassment"—is plainly unconstitutional.

C. The Injunction Is Not Confined to Otherwise Unlawful Conduct Much Less Serious Illegality or Violence.

In the context of protected expressive activities, such as picketing, leafletting, and pure verbal communication, a court may "restrain *only unlawful conduct* and persons responsible for conduct of that character." *NAACP v.*

Claiborne Hardware Co., 458 U.S. 886, 924 n.67 (1982) (emphasis added).[10] In short,

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84.

It follows that injunctive provisions which restrict peaceful, public expression in traditional public forum property violate the doctrine of prior restraints. Rather

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[10] In *Claiborne Hardware*, this Court reviewed a state court order imposing damages and an injunction against numerous civil rights activists. This Court reversed, pointing out that the activists' behavior included both "elements of criminality and elements of majesty." *Id.* at 888. Justice Stevens, writing for the Court, emphasized the need to separate out lawful and unlawful activities before imposing remedial sanctions:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . Specifically, *the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.*

Id. at 916-17 (emphasis added and citation omitted). The "importance of avoiding the imposition of punishment for constitutionally protected activity," *id.* at 934, required this Court to reverse the sweeping imposition of damages liability.

"For the same reasons," the Court continued, "the permanent injunction" imposed against the activists "must be dissolved." *Id.* at 924 n.67. This Court declared that the lower court, on remand, "may wish to vacate the entire injunction" if the facts indicated that the order was "no longer necessary"; at a minimum, however, "the injunction *must* be modified to restrain *only unlawful conduct* and the persons responsible for conduct of that character," *id.* (emphasis added).

than limit itself to unlawful activities, such as blockading or trespass, the injunction in this case bans a broad range of peaceful expressive activity, including picketing, leafletting, and even mere conversation.

Therefore the speech-restrictive portions of the amended permanent injunction, i.e., ¶¶ 3-6, 9 (Pet. App. B-7 to 9), are unconstitutional prior restraints on speech.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Supreme Court of Florida.

Respectfully submitted,

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